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The Commonwealth of Massachusetts
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Automatic Sprinkler Appeals Board

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VICE CHAIR

Docket # 2006-31
25 Hayward Street
Hopkinton, MA.

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination of the Hopkinton Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned by William Tetlow which features an establishment within said building which operates under the name of O'Toole's. Said establishment is operated by Mr. Frank O'Toole. The building owner and business operator are hereinafter referred to as the Appellant. The building, which is the subject of the order, is located at 25 Hayward Street, Hopkinton, MA.

B) Procedural History

By written notice received by the Appellants on December 20, 2005, the Hopkinton Fire Department issued an Order of Notice to the Appellants informing them about the provisions of a new law, M.G.L c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain buildings or structures. The building subject to the order is located at 25 Hayward Street, Hopkinton, MA. The appellant filed an appeal of said order on February 3, 2006. The Board held a hearing relative to this appeal on February 23, 2007, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was: Joseph Maiona, Jr., Esq. and William Tetlow, building owner. Chief Gary T. Daugherty represented the Hopkinton Fire Department.

Present for the Board were: Maurice M. Pilette, Chairperson; Paul Donga, Vice Chair; Stephen D. Coan, State Fire Marshal; Alexander MacLeod; Chief Thomas Coulombe; Peter Gibbons; Aime R. DeNault; and George A. Duhamel. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

Following the February 23, 2007 hearing, the board determined that additional testimony was necessary. Accordingly, another hearing was held on March 13, 2007, at the Department of Fire Services, Stow, Massachusetts.

At the March 13, 2007 hearing, it was noted that several board members were not present who sat on the February 23, 2007 panel. Additionally, there were several new board members at the March hearing who did not sit for the February 23, 2007 hearing. This issue was discussed with the parties who all agreed to proceed with the hearing and Board determination with the present board members without objection. It was agreed that the both parties would be given the broad ability to re-submit and emphasize evidence presented at the prior hearing. Additionally, the Board members who were not present at the previous hearing would be allowed to review the record in its entirety.

Appearing on behalf of the Appellant at the March 13, 2007 hearing were: Joseph Maiona, Jr., Esq., Frank O'Toole, owner of O'Toole's, and Steven O'Toole, Manager. Chief Gary T. Daugherty and Lt. P. Kenneth Clark represented the Hopkinton Fire Department.

Present for the Board were: Thomas Coulombe, Acting Chairman; Boston Fire Commissioner Roderick J. Fraser; Alexander MacLeod; John Mahan; and George Duhamel. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Hopkinton Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal filed by the Appellant
2. Order of the Hopkinton Fire Department
3. Notice of Pre-Hearing Status Conference to Appellant
4. Notice of Pre-Hearing Status Conference to Hopkinton Fire Dept.
5. 2nd Notice of Pre-Hearing Status Conference to Appellant
6. 2nd Notice of Pre-Hearing Status Conference to Hopkinton Fire Dept.
7. Letter to Board indicating Business Owner turned appeal over to Building Owner
8. Notice of Hearing to Appellant
9. Notice of Hearing to Hopkinton Fire Dept.
10. Appellant's submissions (A-G)
11. Appellant's 2nd submissions (1-10 as marked)
12. Notice of 2nd hearing to Appellant
13. Notice of 2nd hearing to Hopkinton Fire Dept.
14. Appellant's floor plan

E) Subsidiary Findings of Fact

- 1) By Notice received by the Appellant on December 20, 2005, the Hopkinton Fire Department issued an Order to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 25 Hayward Street, Hopkinton, MA, in accordance with the provisions of M.G.L. c. 148, s.26G½. This building is rented and used by O'Toole's, a private, for profit business establishment. The Appellants filed their appeal of the Order with this Board on February 3, 2006.
- 2) This establishment features a bar and a restaurant area on the first floor and a small function/meeting room on the second floor. According to the building's most recent Certificate of Inspection, dated June 30, 2006, the establishment has a total allowable occupant load of 160 persons. This occupant load is broken down into the three areas. The bar area has seating for 25 and 41 standees and the main dining room has a limit of 54 at tables and chairs. The second floor meeting room has an established limit of 40 persons (in tables and chairs). The Appellant testified that the occupant load in the years prior to the enactment of s. 26G½ was under 100 persons for the entire establishment and indicated that the new occupancy limits were established by the building official to determine the capacity for s. 26G½ purposes. The most recent, June 30, 2006, Certificate of Inspection indicates a use group classification of "A-2" for the first floor bar area, and "A-3" for the first floor restaurant/dining room portion. A use group classification is not indicated for the 2nd floor. Prior year certificates of inspection were provided which indicated that, in the past, the establishment was classified as an "A-3" use group, which is typical of an establishment considered a restaurant. On both certificates it is indicated that the establishment is known as "O'Toole's Restaurant".
- 3) The Appellant contends that the establishment is principally used, advertised and held out as a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s. 26G½. In the alternative, the Appellant asserts that if the bar area is considered a "bar" under s. 26G½, said area is not subject to the sprinkler law because the capacity is less than 100 persons. The Appellant testified that the dining room portion is open Monday, Tuesday and Wednesdays from 11:00 a.m. until 9:00 p.m. and on Thursdays, Fridays and Saturdays until 10:00 p.m. Full meals are featured and routinely served in the first floor "bar" area at the same time meals are served in the dining area. The Appellant stated that occasionally the entire facility closes as early as 10:30 p.m. After the dining area is closed off, lighter food items, in the form of sandwiches and snacks, are offered to patrons until closing time. The bar area remains open usually no later than 12:00 midnight. Last call is usually at approximately 11:30 p.m.
- 4) With respect to the area located on the 2nd floor, the Appellant indicated that the establishment no longer uses this area. However, in the past, the area was used for small private events such as wedding and baby showers. During such use, the Appellant testified that a separate service bar was employed so persons did not have to travel to the 1st floor bar area for beverages.
- 5) The facility does not hold any entertainment licenses and therefore does not feature recorded or live entertainment.
- 6) The Appellant testified and provided documentation from a certified public accountant that

indicated that the breakdown between food and alcohol sales was approximately 55% food and 45% alcohol during the years 2001 through 2005.

- 7) The Appellant noted that that the sprinkler provisions of M.G.L. c. 148, s.26G½ apply to that portion of a building used or designed as a nightclub, dance hall, discotheque or bar or similar entertainment venue with capacity of at least 100 persons. Appellant indicated that this particular establishment features characteristics of both a restaurant and a bar. However, Appellant indicated that a clear physical and operational separation exists between that portion of the establishment used as a restaurant and that portion used as a bar.
- 8) The representative for the fire department issued the Order to install sprinklers based upon the overall building capacity, which is over 100 persons and the existence of a full liquor license, which allows the service of liquor until 1:00 a.m. Chief Daugherty indicated that the facility was previously advertised as a pub, with the exterior and interior décor consisting of beer signs and other advertisements throughout the establishment. The Chief did not contradict the Appellant's assertion that the establishment features physical separations between the bar and dining areas. However, it was his opinion that the establishment features "free flowing" characteristics. He stated that he is aware that there have been times when the dining room has been shut-off for private functions and that persons from the dining area were allowed to order drinks from the bar area. He also noted that female patrons in the bar area need to walk through the dining area to gain access to the women's room located in the dining room. There was no indication that this establishment has had a history of instances of overcrowding.
- 9) The Appellant, pursuant to the request of the board after the first hearing date, submitted another floor plan which provided a more detailed indication of the location of interior walls and doors enabling the board to better determine the extent of the existing physical separation between the bar area, dining room and 2nd floor area. Appellant indicated that patrons are monitored by bar staff and are prevented from sitting in the dining room area once it is closed down. The Appellant did not present any facts contesting the conclusion that the bar area, which remains open for approximately 1.5 hours after the dining area is closed-off, features the characteristics of a "bar" as that term is used in s. 26G½. However, Appellant noted that said bar portion of the establishment clearly has a capacity of less than 100 persons.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2d paragraph of M.G.L. c. 148, s. 26G½, in pertinent part, states: "every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes...(a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code". The law was effective as of November 15, 2004. Under the provisions of the new law (St.2004, ch.304, c.11) an owner is required to submit plans and specifications for the installation of such sprinklers within 18 months of the effective date of the act (May 15, 2006) and is required to complete the mandated sprinkler installation by November 15, 2007.

- 2) This establishment has many characteristics that are typical of a restaurant. It appears that the service of food is the primary customer attraction, particularly in that portion of the building considered the dining area. The mandatory sprinkler requirements provided in s. 26G½, specifically do not apply to a place of assembly within a building or structure or portions thereof used “principally as a restaurant”. Such restaurant establishments feature meals as the main or principal customer attraction.
- 3) However, it appears that this particular establishment also features a portion of the building that could be considered a “bar” or lounge area where meals are served in this area, but it is also designed and used to serve alcoholic beverages directly to customers, who desire alcoholic beverages only, for a period of approximately two hours after the dining portion of the facility is closed. The establishment also features a small 2nd floor function room that has been used for a variety of function purposes including private dining, weddings and bridal showers. This type of establishment, that features combined characteristics of a restaurant, bar and function room are fairly common throughout the Commonwealth, yet present unique challenges in implementing the provisions of section 26G½.

In an attempt to interpret the legislative intent of this law as applied to such establishments, the board will look to the plain language of the statute in rendering a determination. The Board notes that section 26G½, in pertinent part, requires the installation of an adequate system of automatic sprinklers in: “Every ... building or structure ... or portions thereof, of public assembly with a capacity of 100 persons or more that is designed or used for occupancy as a ... nightclub, dancehall discotheque, bar or similar entertainment purposes...”. In determining whether the sprinkler requirements apply in this case and other similar cases that involve a building, which features a combination of characteristics, the legislature’s use of the words “portions thereof” in describing the areas of the building subject to the sprinkler installation is significant. This language clearly requires an analysis of the building’s characteristics and floor plan to determine if a reasonable separation exists between that portion of the building used or designed for bar or entertainment purposes and the other portion of the building not subject to the law. In determining if a sprinkler system is required in such “combination” establishments the Board will conduct the following two-part analysis:

1. Is that portion of the building used or designed for bar or entertainment purposes reasonably apportioned and separate from the other areas of the building? In determining this question there must be a sufficient physical separation that exists between the entertainment or bar portion from the rest of the establishment, which prevents the occupants or activities of the bar to expand into the dining area. Such separation can include a permanent wall or closed door. Additionally, there must be a separation, in an operational or business context, that exists which assures that the activities that occur in the bar or entertainment area do not overflow or expand into the restaurant or other areas when such areas are no longer in operation.
 2. If the separation exists, as described in question #1, does that portion used or designed for bar or entertainment purposes legally exceed a capacity of 100 persons or more?
- 4) The above analysis, applied to this particular establishment indicates the existence of a physical

separation between the bar area and the rest of the establishment which prevents the bar activities from expanding into the dining area. This separation includes a permanent wall with a door that is capable of closing. The bar area also has a separate and independent means of egress. Additionally, there was testimony that a separation, in an operational and business context, exists which assures that the activities that occur in the bar area do not overflow or expand into the restaurant or other areas when they are shut down. The portion of the building used as a bar has capacity of 60 persons as indicated in the current certificate of inspection. This amount is less than the statutory capacity of 100 persons or more, which would require the installation of sprinklers in this bar area.

- 5) With respect to the small function room on the second floor, Appellant indicates that this area is no longer in use. However, this use or non-use is at the option of the Appellant. In the past, this area was routinely used for private small wedding and baby shower type functions. The described uses and activities that currently occur in that room are not consistent with the characteristics of an “A-2 like” use group that this board has previously determined to be typical of a nightclub, dance hall, discotheque or similar entertainment purpose. Those characteristics are as follows:

- a) No theatrical stage accessories other than raised platform;
- b) Low lighting levels;
- c) Entertainment by a live band or recorded music generating above-normal sound levels;
- d) Later-than-average operating hours;
- e) Tables and seating arranged or positioned so as to create ill defined aisles;
- f) A specific area designated for dancing;
- g) Service facilities primarily for alcoholic beverages with limited food service; and
- h) High occupant load density.

Additionally, this function room is on a separate floor from the bar and restaurant area and, like the bar area, is separate and apportioned, both physically and operationally, from the activities on the first floor. The capacity of this area is 40. This amount is less than the s. 26G½ capacity number (100 persons or more) which triggers the sprinkler installation in those portions of a building that are used or designed as a nightclub, dance hall, discotheque, bar or similar entertainment purpose.

G) Decision and Order

The dining area of this establishment clearly has the characteristics of a restaurant. The sprinkler requirements of M.G.L. c.148, s. 26G½ do not apply to establishments principally used and designed as a restaurant. Although a bar exists in the first floor portion of this building, it is sufficiently apportioned and separated, both physically and operationally from the restaurant and other areas of this building. This portion of the building, used or designed as a bar, does not have a legal capacity of 100 persons or more as required by s. 26G½ sprinkler mandate. The second floor private function area, as currently used is not considered a nightclub, dancehall, discotheque, or bar or since it does not present the characteristics typical of an “A-2 like” assembly use group. Additionally, this 2nd floor area is sufficiently physically separate from the

remaining areas of the building. This function hall is also operationally separate from the remaining portions of the building. This portion of the building, even if it was used for such entertainment purposes does not have a legal capacity of 100 persons or more as required by the s. 26G½ sprinkler mandate.

For the foregoing reasons, this Board unanimously **reverses** the Order of the Hopkinton Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½. This determination is contingent upon:

1. The continued use and operation of the establishment in a manner consistent with the findings herein; and
2. The establishment continues to prevent customers who use the 2nd floor function area from purchasing beverages in the first floor bar portion. This can be accomplished by routinely providing an independent source of beverages (such as a service bar) within the area. This condition assures that an operational separation exists between the other portions of the establishment and will prevent the potential for an overcrowding situation in the first floor bar area.

H) Vote of the Board

Thomas Coulombe, (Chairperson)	In Favor
Roderick Fraser, Boston Fire Commissioner	In Favor
Alexander MacLeod	In Favor
John Mahan	In Favor
George Duhamel	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Thomas Coulombe, Acting Chairman

Dated: April 10, 2007

**A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED TO:**

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